September 1, 2015

Ms. Marlene H. Dortch
Secretary
Federal Communication Commission
445 12th Street, SW
Washington DC 20554

RE: Oral Exparte Notification: Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-29 (rel. Mar. 31,2014); Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Docket No. 12-268

Dear Ms. Dortch:

On behalf of the New York State Broadcasters Association, Inc., Chris Musial, Vice President and General Manager of Television Station WBBZ-DT, Buffalo, New York and the undersigned met with Valery Galasso, Policy Advisor Commissioner Jessica Rosenworcel on August 31, 2015 to discuss issues in the above referenced docket. No written materials were presented at the meeting. The issues discussed are summarized below.

We discussed the importance of the network non-duplication and syndicated exclusivity rules to the continued viability of a free, local broadcast platform. The FCC's license allocations are based on providing TV stations to <u>local</u> communities. These rules are essential to the system of local licensing by providing an efficient marketplace for distributing programming to local markets. In this regard, I noted that the rules do not convey a substantive right, *per se*. Rather the rules provide an efficient enforcement mechanism for stations that have otherwise obtained these rights in the program acquisition market place.

We discussed at length whether these rights may be protected through private lawsuits that seek to enforce programming agreements. I noted that this would lead to multiple lawsuits and would not provide an efficient mechanism to facilitate program distribution to local broadcast stations. There are three concerns with relying on the courts and litigation to enforce exclusivity arrangements.

First, the importation of a distant broadcast signal involves an arrangement between the cable operator and the distant broadcast station. Local stations have no contractual arrangement with the distant station, and therefore lack the necessary privity of contract to prevent a local cable operator from importing a distant broadcast signal.

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Second, while programming contracts grant a local broadcaster exclusive rights in its own market, this generally means that the program supplier will not sell the program to another television station in that market. It is far from clear whether existing contracts create an obligation on the part of a program supplier to become an "exclusivity enforcer." Depending on the language of the contract, a local station may not have the legal right to compel its program supplier to stop a television station in a distant market from entering into a separate agreement with a cable operator to transport that distant station's signal into a different market. Even if such out of market transport constitutes a breach of the programming contract by the distant station, this does not mean that the program supplier will be able to stop such an arrangement. Indeed, the local station that is being harmed may not be able to pursue any legal action because it must first prove that it is a third party beneficiary to the contract between the program supplier and the out of market distant station, and third party causes of action are not universally recognized.

Third, as for future contracts the record is devoid of any indication that a program supplier has the legal ability or desire to assume the role of an "exclusivity enforcer." Generally, program suppliers are willing to agree that they will honor exclusivity arrangements and not sell programs to other stations in the same market. Such activity is within the control of the program supplier, and it is willing to be responsible for its own actions. However the importation of a distant TV signal would be precipitated by the agreement between a distant TV station customer and a cable operator. This activity does not directly involve the program supplier and is beyond its immediate control. The program supplier has no way to assess the potential risks and costs associated with a number of stations that, at the urging of cable operators, begin transmitting signals outside their local markets. A program supplier may be unwilling to assume the role of an "exclusivity enforcer" and be drawn into multiple lawsuits every time a cable operator decides to import a distant broadcast station. In fact, as the Commission continues to see, cable systems have carried stations without their consent. Moreover, the program supplier may be forced to sue, or threaten to sue, one or more of its own customers. Rather than take the risk of being exposed to uncertain litigation costs, a program supplier may decide to include contractual provisions that expressly eschew these obligations, or simply decline to take action. Alternatively, program suppliers may forego providing local stations with exclusive rights. The key point is that the FCC has no record evidence that would allow it to predict how program suppliers would react to the elimination of the exclusivity rules. Rather the Commission simply assumes that exclusivity can and will be enforced through the courts. Absent a full record, such an assumption is misplaced.

Eliminating the exclusivity rules increases the probability that agreements with local stations will not be reached, thereby creating more "black out" situations. Local stations and cable operators agree to retransmission consent agreements in the overwhelming majority of cases. While they grab headlines, failed negotiations that lead to "black outs" constitute a small fraction of all negotiations. Absent the exclusivity rules, however, cable operators have a tremendous incentive to break off negotiations, drop the local station and import a distant signal. This option is attractive because the cable operator only has to pay a below-market distant signal fee as required under the compulsory license, plus whatever fee the distant signal will charge. Indeed, exerting leverage in retransmission consent negotiations is the very reason the cable industry wants to change the rules. Moreover, cable operators have an incentive to punish their competitors for local advertising by dropping local stations from the cable line up, and inserting a distant signal. This means the local television station will lose access to a majority of local cable subscribers thereby undermining it as a competitive platform for local advertisers. As a result of these incentives, we can expect more retransmission consent negotiations to fail. Unfortunately, while nationally distributed entertainment shows will be seen on the imported distant signal, local news, public affairs shows and emergency information will not. This is not only a net loss to the public, but threatens to leave consumers without access to information about emergencies or about local matters.

The proposal to eliminate the exclusivity rules undermines existing retransmission arrangements, creating chaos in the programming market. As noted above, the overwhelming majority of retransmission consent negotiations end in an agreement with few problems. However, in situations where a cable operator brings in a distant station, it is highly likely that the distant station will be carrying syndicated programs that are already being broadcast in a local market by stations that have already reached retransmission consent agreements with a local cable operator. First run syndicated shows such as *Wheel of Fortune, Jeopardy, Entertainment Tonight* or the *Ellen Sho*w appear on a variety of different affiliated stations in different markets. The same holds true for off-network syndicated shows. For example, the same syndicated show may be broadcast by an NBC affiliate in one market and a CBS affiliate in another market. When a cable operator imports a distant network signal, it will import a variety of different syndicated shows carried by that distant station. Many of these syndicated programs are being broadcast on local stations that have retransmission consent agreements with the local cable operator. Thus, importing a distant signal may have the consequence of duplicating programming on multiple stations in the market. This may trigger multiple law suits and unravel retransmission consent agreements throughout the market. Absent the syndex and network non duplication rules, local stations, including those that have reached a valid retransmission consent agreements with a local cable system, can never be assured that they will have secured exclusivity in the marketplace.

We discussed proposals to delay the effective date of any repeal by three years. We pointed out that affiliation and syndication agreements are negotiated well in advance, so that a delay of three years in fact means less than one and a half year for all parties in this complex marketplace to adjust contracts and expectations. Even with a three-year delay in implementation, repeal of these rules will directly affect negotiations that will happen later this year and next. And that raises a different problem since this disruption to the programming market would take place at the very same time as the broadcasting industry will be experiencing perhaps significant changes as a result of the upcoming incentive auction. Not only would this be adding disruption to disruption in the broadcasting market, but the anti-collusion rule that will apply for many months may already make negotiations about future programming difficult; adding a new approach to exclusivity could either throw the programming market into complete chaos or disincent some stations from participating in the auction.

We also noted that the current exclusivity rules must be viewed in the context of significant government intrusion into the overall programming marketplace caused by the cable compulsory license. The syndicated exclusivity and network non-duplication rules were deemed essential to balance a cable operator's ability to import a distant broadcast signal by paying below-market distant signal fees. The exclusivity rules and compulsory license operate in tandem. You cannot eliminate the exclusivity rules without also eliminating the compulsory license. The Commission has recognized this point in multiple proceedings.

Those seeking to eliminate the exclusivity rules state that the rule is no longer necessary in today's video marketplace. Today's hypercompetitive video marketplace makes exclusivity more important than it was when the rules were adopted. Consumers have a plethora of video options. Unless a local station can provide unique and exclusive programming, it will lose audience and revenue. Similarly, program suppliers have a number of platforms on which to sell product. The transaction costs and risks associated with selling programs are an increasingly important consideration. As noted above, no programmer wants to bear the costs and risk of becoming an "exclusivity enforcer." Placing this burden on a program supplier simply creates an incentive for a program supplier to sell content to a less risky video platform. Program suppliers may prefer to sell exclusive content to nationally distributed cable and satellite networks or over the top video services as opposed to selling content to a number of different local television stations. Simply stated, eliminating the exclusivity rules will drive top quality content away from the local broadcast system and on to nationally distributed pay-based services.

Some of the comments supporting elimination of the network non-duplication and syndex rules argue that it is somehow wrong for broadcasters to have exclusive rights to programming in their market. But this is no different from any other programming carried on a cable system; if a cable operator wants to provide the *NFL Network* or *TBS*, it has only one place to go. And if it cannot reach an agreement with the cable network, cable operators cannot go to another nearby cable system and ask to redistribute those networks. Yet that is precisely what cable argues it should be permitted, if not encouraged to do, with broadcast programming.

Finally, there is a fundamental question of how the public will be served by eliminating the existing exclusivity rules. There is no evidence in the record that consumers are being harmed by the existing rules. The rules have worked. There is certainty in the market place. The rules created an efficient mechanism that has led to the orderly distribution of quality program to local communities across the country. Ensuring exclusivity has helped create the economic foundation for the provision of local news, and ensures that stations have the resources to serve their communities during emergencies such as Super storm Sandy.

On the other hand, eliminating the exclusivity rules undermine a government-based system of television stations that are allocated to specific local communities pursuant to section 307(b) of the Communications Act. The public is not served by stations spending millions of dollars trying to secure exclusivity through litigation. Such an approach is inefficient and unworkable. These resources are better spent obtaining top quality program and providing news resources to the community. Absent an efficient mechanism to secure exclusivity, stations will be unable to attract quality programs. The resulting loss in audience will have an impact on the provision of news and public affairs programming. Consumers that will be hurt the most are those that do not subscribe or are unable to afford pay-based cable services. These consumers will see their free, advertiser supported view options decline and wither. Such a result is not in the public interest.

Respectfully submitted,

/s/ David Donovan

David Donovan
President
New York State Broadcasters Association, Inc.

cc: Valery Galasso
Office of the Honorable Jessica Rosenworcel
Federal Communications Commission